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CASE NO.

in the

Supreme Court

of the

United States

OCTOBER TERM, 1986

JAMES DUNSTER and JEAN DUNSTER, individually and as personal representative of the Estate of James Dunster, Jr.,

Petitioners,

vs.

METROPOLITAN DADE COUNTY and PETER AYDELOTTE,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals for the Eleventh Circuit

RESPONDENTS' BRIEF IN OPPOSITION

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QUESTIONS PRESENTED FOR REVIEW

Respondents respectfully restate the questions presented for review as follows:

1. Where a person is killed because of the negligent handling of a firearm by a police officer employed by a county and the jury finds that a county policy with respect to the handling of firearms falls below acceptable standards of police procedure and is the proximate cause of the death, can the county be liable under 42 U.S.C. §1983?

2. Did the court of appeals make the correct disposition of the cause by remanding with instructions to enter judgment for respondents?

3. Did the court of appeals correctly decline to consider whether the deceased suffered a Fourth Amendment violation on the ground that plaintiffs abandoned their Fourth Amendment claims at trial?

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RESPONDENTS' BRIEF IN OPPOSITION

OPINIONS BELOW

Respondents accept petitioners' Statement of the Opinions Below.

JURISDICTION

Respondents accept petitioners' Statement of Jurisdiction.

STATUTE INVOLVED

Respondents accept petitioners' Statement of the Statute Involved.

STATEMENT OF THE CASE

Respondents do not accept petitioners' Statement of the Case. Respondents incorporate and adopt as their Statement of the Case the recitation of the facts and proceedings below as set forth in the opinion of the circuit court of appeals reported at 791 F.2d 1516 and reprinted in the appendix to the petition for writ of certiorari.

REASONS WHY THE PETITION SHOULD BE DENIED

I.

THE COURT OF APPEALS CORRECTLY VACATED THE JUDGMENT AGAINST THE COUNTY

Petitioners assert that the decision of the court of appeals on this point conflicts with *Kibbe v. City of Springfield*, 777 F.2d 801 (1st Cir. 1985) and states that the following instruction was given to the jury which resulted in a verdict for plaintiff affirmed on appeal (777 F.2d at 809-810): "A government body can be found responsible for the *deprivation of a person's civil rights* if the actions taken by its employees are in accordance with a custom or practice of the government and those actions caused the deprivation of the person's rights" (Emphasis supplied). Petitioners apparently mean to imply that this is the holding of the case.

Even if the quoted instruction did constitute the holding of the case (which respondents assert it did not), it simply begs the question of what constitutes a "deprivation of a person's civil rights." The holdings of this Court in *Daniels v. Williams*, ____ U.S. ____, 106 S.Ct. 662, 88 L.Ed.2d 662 (1986) and *Davidson v. Cannon*, ____ U.S. ____, 106 S.Ct. 668, 88 L.Ed.2d 677 (1986) make it clear that mere negligence could not constitute a "deprivation" in the constitutional sense. The verdict and the judgment entered thereon in the instant case make it clear that the jury was only asked to determine whether the conduct of the respondent

police officer amounted to simple negligence and that was all that the jury did determine. Nowhere do petitioners assert that they objected in the district court or the court of appeals to the form of the special interrogatories submitted to the jury. These enabled the jury to find the deceased 25% negligent and caused the district court to reduce the damage award by 25% in accordance with the rule of comparative negligence. Inasmuch as the injury or loss in the instant case was caused by negligence, such injury or loss did not amount to a deprivation in the constitutional sense, and the county therefore cannot be found responsible for a deprivation which did not occur.

It is astounding that petitioners would rely on *Kibbe*. In point of fact, the court of appeals there held that the verdict and judgment in favor of plaintiff should be affirmed because the instructions to the jury sufficiently informed the jury that in order to find the city liable, "it must find a failure to train which amounted to gross negligence." 777 F.2d at 810. This Court granted certiorari and then dismissed the writ as improvidently granted. Four justices dissented from the dismissal of the writ and concurred in an opinion expressing the view that even gross negligence was not a sufficient basis for municipal liability for police training, rather the requisite standard of fault should be deliberate indifference or reckless disregard of the consequences. *City of Springfield v. Kibbe*, ____ U.S. ____, 107 S.Ct. 1114, 1121 (1987). The lower court cases there cited establish that the minimum degree of fault necessary to establish municipal liability for police training policies is, at least, gross negligence. Indeed, the court of appeals decision in *Kibbe*, relied upon by petitioners, stands for this proposition.

Inasmuch as the petitioners made no attempt to establish by the verdict more than simple negligence in the formulation of county policy, the court of appeals correctly determined that the county was entitled to a judgment notwithstanding the verdict.

II

THE COURT OF APPEALS MADE THE CORRECT DISPOSITION OF THE CASE BY REMANDING WITH INSTRUCTIONS TO ENTER JUDGMENT FOR RESPONDENTS

Petitioners cite three decisions of other courts of appeals and assert that they conflict with the decision of the court of appeals below. These decisions are *Liss v. School District of City of Ladue,* 548 F.2d 751 (8th Cir. 1977); *Uzzell v. Friday,* 625 F.2d 1117 (4th Cir. 1980); and *Women's Health Services, Inc. v. Maher,* 636 F.2d 23 (2d Cir. 1980). Petitioners argue that these decisions stand for the proposition that where there is an intervening change of law during the pendency of an appeal which requires reversal of the judgment under review, the correct disposition is to remand the cause for a new trial. Conflict is claimed on the ground that the decision below remanded with instructions to enter judgment for appellants.

In the *Liss* case, the court of appeals remanded for further proceedings in large part because of certain specific findings by the district court which were consistent with a conclusion that defendant was liable even under the new standards promulgated in the

intervening decision which represented a change in the law. The district court had originally found against the defendant after a non-jury trial. *Uzzell* was simply a reversal of a summary judgment upon a conclusion that material issues remained for determination. In *Maher*, the district court entered a preliminary and final injunction against enforcement of a state regulation implemented by a federally funded program. The federal agency was a third party defendant and the state was the defendant. Intervening decisions required reversal. The third part defendant urged remand for further proceedings because of remaining unresolved issues pertaining to the third party complaint. The plaintiff and the defendant objected. The court proceeded as urged by the third party defendant, giving two reasons therefor. First, the defendant state would not be prejudiced since the preliminary, as well as the final injunction, would be vacated leaving the state free to enforce the regulation pendente-lite. Second, the court of appeals observed that the state legislature could enact modifications which would resolve or render moot most of the issues.

The decision below was a review of a denial of a motion for judgment notwithstanding verdict; whereas, none of the above three cases relied upon for conflict were jury trials. That fact alone is a sufficient basis to distinguish this case from those cases and show a lack of true conflict. It is well established that the court of appeals has power to order judgment for defendant where it sets aside a verdict for plaintiff and reverses the trial court's failure to grant a judgment notwithstanding verdict, especially where a dispositive issue of law is resolved in defendant's favor on appeal.

Neely v. Eby Construction Co., 386 U.S. 317, 326-7, 18 L.Ed.2d 75, 83, 875 S.Ct. 1072 (1967).

In the instant case, a dispositive issue of law was resolved in defendants' favor. Moreover, respondents contend that the dispositive issue would have been resolved in defendants' favor under the law as it existed prior to the intervening decisions of *Daniels v. Williams*, ____ U.S. ____, 106 S.Ct. 662, 88 L.Ed.2d 662 (1986) and *Davidson v. Cannon*, ____ U.S. ____, 160 S.Ct. 668, 88 L.Ed.2d 677 (1986).

Parratt v. Taylor, 451 U.S. 527 (1981) did not hold that recovery could be had under 42 U.S.C. §1983 for ordinary negligence under all circumstances, but only that negligence did not necessarily foreclose liability thereunder. Quoting *Baker v. McCollan*, 443 U.S. 137, 139-40, 61 L.Ed.2d 433, 439, 99 S.Ct. 2689, 2692, the Court recognized that the question might not be susceptible of a uniform answer in all conceivable cases. Thus, it has always been clear that the Fourteenth Amendment does not protect against all physical injury but only against those which are so brutal, demeaning and shocking as to shock the conscience of a court. See, e.g., *Shillingford v. Holmes*, 634 F.2d 263, 265 (5th Cir. 1981); *Hall v. Tawney*, 621 F.2d 607, 613 (4th Cir. 1980); *Johnson v. Glick*, 481 F.2d 1028, 1033 (2d Cir. 1973). In *Hall*, the court noted that in police cases and in school punishment cases the test was whether the force was caused by malice or sadism rather than "merely careless or unwise excess of zeal". (621 F.2d at 613). In *Shillingford*, the Fifth Circuit distinguished actions which might be permissible in dealing with a life-threatening situation but which would be judged

differently when taken against a peaceful pedestrian. (634 F.2d at 265). In *Williams v. Kelley,* 624 F.2d 695 (5th Cir. 1980), a prisoner was killed by guards through use of a choke hold. The court of appeals concluded that the conduct of the guards was not sufficiently egregious so as to be "constitutionally tortious", even though the guards may have been negligent. Decisions of the Fifth Circuit decided prior to October 1, 1981, are binding precedent in the Eleventh Circuit. *Bonnner v. City of Pritchard,* 651 F.2d 1107, 1120 (11th Cir. 1981).

In *Mills v. Smith,* 656 F.2d 337 (8th Cir. 1981), a police officer struggled with the plaintiff while the officer held a cocked weapon which discharged and injured the plaintiff. The court discussed *Parratt v. Taylor,* (656 F.2d at 340, n. 2) and held that plaintiff's constitutional rights had not been violated.

Accordingly, we submit that *Daniels v. Williams, supra,* and *Davidson v. Cannon, supra,* clarified the law but did not radically change it. Under those circumstances there is no need to give plaintiffs a second chance to prove their case, since it was insufficient under pre-existing law.

III

THE COURT OF APPEALS CORRECTLY REFUSED TO CONSIDER WHETHER THE DECEASED SUFFERED A FOURTH AMENDMENT VIOLATION ON THE GROUND THAT PLAINTIFFS ABANDONED THEIR FOURTH AMENDMENT CLAIMS AT TRIAL

In *Tennessee v. Garner,* 471 U.S. 1, 105 S.Ct. 1694, 85 L.Ed.2d 677 (1985), a police officer intentionally shot a suspect fleeing the scene of a burglary. This Court held

that the shooting constituted a seizure and that it was unreasonable, reasoning that it was necessary to balance the quality of the intrusion against the importance of the governmental interest alleged to justify the intrusion. The Court set forth a standard defining the reasonable use of deadly force to be where a police officer,

> ". . . has probable cause to believe that the suspect poses a threat of serious physical harm, either to the officer or to others, it is not constitutionally unreasonable to prevent escape by using deadly force. Thus, if the suspect threatens the officer with a weapon or there is probable cause to believe that he has committed a crime involving the infliction of serious physical harm, deadly force may be used if necessary to prevent escape, and if, where feasible, some warning has been given."
>
> 105 S.Ct. 1701.

The summary of the record in this regard by the court of appeals was entirely accurate. The plaintiffs simply made no effort in the trial court to cause any of the issues involved in a Fourth Amendment claim, as revealed by the above quoted portion of the *Tennessee v. Garner* opinion, to be raised or determined. No jury instructions on any such issues were given. The inclusion of the words "Fourth Amendment" in the pleadings and the pretrial stipulation does not preclude the conclusion that Fourth Amendment issues were not presented at trial. Nor is this conclusion in any way altered by the petitioners' unsupported allegation, made

for the first time in this Court, that some unexplained off-the-record conversation may contain some mention of the Fourth Amendment. 16 C. Wright, A. Miller, E. Cooper, *Federal Practice and Procedure* §3956 (1987 Supp., relied upon by petitioners notes the decision of *Mandel v. Max-France, Inc.*, 704 F.2d 1205 (11th Cir. 1983) which states that the appellee has some responsibility for the completeness of the record on appeal, such as where appellee attempts to assert harmless error.

The special interrogatories submitted to the jury and the jury's answers thereto are completely inconsistent with the test for Fourth Amendment liability as quoted above. It is highly significant that the jury found that the county's policy requiring police to carry firearms at all times, including off-duty drinking in bars, was not a proximate cause of the death. According to the jury, in other words, the officer did not shoot the deceased because the officer was drunk. The jury instead determined that the county's policy allowing police officers discretion in determining when to cock their weapons was the proximate cause of the death. The only reason the cocking of a firearm is dangerous is because it increases the risk of an unintentional discharge. Furthermore, the jury's specific finding identifying the policy which caused the death, along with the finding of comparative negligence, necessarily indicates that the jury believed the officer's account of the incident. He was the only witness to testify that the weapon was cocked. The effect of the jury finding, accordingly, was to classify the shooting as unintentional.

Even if the court of appeals had reached the Fourth Amendment claim, it would have been required to resolve it against petitioners. The Fourth Amendment cannot be implicated by a negligent unintentional shooting. Were that the case, by the same logic, a slip and fall caused by custodial negligence in a building maintained by local government would constitute a Fourth Amendment violation. If the facts of this case, as found by the jury were held to constitute a Fourth Amendment claim, *Daniels v. Williams,* ____ U.S. ____, 106 S.Ct. 662, 88 L.Ed.2d 662 (1986) and *Davidson v. Cannon,* ____ U.S. ____, 160 S.Ct. 668, 88 L.Ed.2d 677 (1986) would be overruled.

If the procedural and substantive protections of the Due Process Clause of the Fourteenth Amendment are not triggered by lack of due care of prison guards, as this Court stated in *Davidson,* 106 S.Ct. at 671, the protections of the Fourth Amendment are not triggered by lack of due care of a municipal or county police officer. As noted by Mr. Justice Douglas, speaking for the Court in *Monroe v. Pape,* 365 U.S. 167, 171, 5 L.Ed.2d 492, 496-7, 81 S.Ct. 473 (1961): ". . . [T]he guarantee against unreasonable searches and seizures contained in the Fourth Amendment has been made applicable to the States by reason of the Due Process Clause of the Fourteenth Amendment." In other words, when applied to state officials, the protections of the Fourth Amendment are themselves protections of the Fourteenth Amendment and are not triggered by mere lack of due care. An "unreasonable" seizure is not committed by an unintentional, negligent act. An "unreasonable" seizure is committed by an intentional seizure done without a sufficient or proper reason.

CONCLUSION

For these reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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